

Objection Date and Time: January 26, 2019 at 4:00 p.m. ET
Hearing Date and Time: February 4, 2019 at 10:00 a.m. ET

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE:

SEARS HOLDINGS CORPORATION, *et al.*,

Debtors.

CHAPTER 11

CASE NO. 18-23538-RDD

(Jointly Administered)

**OBJECTION AND RESERVATION OF RIGHTS OF WASHINGTON PRIME GROUP
INC. TO THE PROPOSED CURE AMOUNTS IN CONNECTION WITH THE DEBTORS'
PROPOSED ASSUMPTION AND ASSIGNMENT OF LEASES AND CONTRACTS**

TO THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

Washington Prime Group Inc. (“WPG”), as managing agent for the owner of the properties identified herein, by its undersigned counsel, FROST BROWN TODD LLC and COOLEY LLP, hereby submits this objection and reservation of rights (this “Objection”) to the above-captioned debtors’ (the “Debtors”): (i) *Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* (Docket No. 1731) (the “First Notice of Potential Assumption and Assignment”); and (ii) *Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction* (Docket No. 1774) (the “Second Notice of Potential Assumption and Assignment” and, together with the First Notice of Potential Assumption and Assignment, the “Potential Assumption and Assignment Notices”).¹ In support of this Objection, WPG respectfully states:

BACKGROUND

1. On October 15, 2018 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (this “Court”).

2. Upon information and belief, the Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in the Potential Assumption and Assignment Notices.

3. WPG is the owner, or the managing agent for the owners of, certain real properties in which the Debtors lease retail space (the “WPG Leased Premises”) from WPG pursuant to those certain unexpired leases (collectively, the “WPG Leases” and each a “WPG Lease”).² Specifically, the Debtors are currently leasing retail space from WPG at the locations identified on **Exhibit A** attached hereto and incorporated herein (the “Leased Premises”).³

4. The Leased Premises are located in “shopping centers” as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

5. On November 1, 2018, the Debtors filed their *Motion for Approval of Global Bidding Procedures* (Docket No. 429) (the “Sale Motion”) seeking, among other things, approval of procedures to market, auction, and sell the Debtors’ real estate and other assets as a going concern, separated into: (i) procedures that apply to certain “go-forward” stores and related assets that the Debtors have deemed profitable; and (ii) global procedures that apply to the Debtors’ remaining assets that are not sold as part of the “go-forward” stores (collectively, the “Proposed Sale”).

6. On November 19, 2018, this Court entered its *Order Approving Global Bidding Procedures and Granting Related Relief* (Docket No. 816) (the “Sale Procedures Order”) which, among other things, approved the Sale Motion.

7. Based on information and belief, on January 14, 2019, the Debtors commenced an auction for the sale of the Global Assets (the “Auction”) whereby the Debtors selected an offer by

² See Footnote 3.

³ The WPG Leases on Exhibit A include certain operating agreements and other agreements that WPG has entered into with non-debtor party Seritage SRC Finance LLC, identified as “Seritage SRC Finance LLC-Associated Leases” on Exhibit A, as well as certain operating agreements and other agreements that WPG has entered into with Debtors. WPG is not asserting a Cure Amount, as defined herein, with respect to any Seritage SRC Finance-LLC Associated Lease but is reserving all of its rights accordingly.

Transform Holdco, LLC (the “Proposed Buyer”), established by ESL Investments, Inc., as the highest and/or best offer for all or substantially all of the Global Assets.

8. In connection with the Sale Procedures Order, on January 18, 2019, the Debtors filed the *Notice of Successful Bidder and Sale Hearing* (Docket No. 1730) (the “Notice of Successful Bidder”) stating that the Proposed Buyer was the highest and/or best offer for all or substantially all of the Global Assets. Attached to the Notice of Successful Bidder is the proposed Asset Purchase Agreement between the Proposed Buyer and the Debtors and the proposed sale order approving the proposed Asset Purchase Agreement (the “Proposed Sale Order”).

9. On January 18, 2019, the Debtors filed the First Notice of Potential Assumption and Assignment, and on January 23, 2019, the Debtors filed the Second Notice of Potential Assumption and Assignment. The Potential Assumption and Assignment Notices identify certain executory contracts and unexpired leases that the Debtors might assume and assign as part of the Proposed Sale, including certain of the WPG Leases identified on Exhibit A attached hereto and incorporated herein (the “Potentially Assigned WPG Leases”).⁴ The Potential Assumption and Assignment Notices propose \$436,993.11 as the aggregate amount necessary to cure all monetary defaults under the Potentially Assigned WPG Leases (the “Proposed Cure Amount”).

10. As provided in the Notice of Successful Bidder and the Potential Assumption and Assignment Notices, objections to, among other things, the Proposed Sale to the Proposed Buyer, the Proposed Cure Amount, and the potential assumption and assignment of leases and contracts are due by January 26, 2019 at 4:00 p.m. (Eastern).

⁴ The Second Notice of Potential Assumption and Assignment schedules three “Master Leases” with WPG, identified as Contract Nos. 645, 646, and 647 with expiration dates of November 30, 2020. WPG is unable to specifically identify these “Master Leases” and, accordingly, WPG reserves any and all of its rights with respect to these “Master Leases,” including WPG’s rights to object on any grounds associated with the “Master Leases.”

OBJECTION

11. Any assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases, must be conditioned on the Debtors' compliance with the requirements of section 365 of the Bankruptcy Code, including, but not limited to, paying all amounts due and owing under each of the WPG Leases, including the Potentially Assigned Leases, through the effective date of the assumption and assignment of the WPG Leases.

12. As of the date of this Objection, the aggregate cure amount owing under the WPG Leases, including the Potentially Assigned Leases, is \$2,149,657.17 (the "Cure Amount").⁵ Attached hereto and incorporated herein as **Exhibit A** is a schedule listing the Proposed Cure Amount and corresponding Cure Amount for each of the WPG Leases, including the Potentially Assigned WPG Leases.

13. The Cure Amount represents the amounts currently due and owing to WPG under the WPG Leases, including the Potentially Assigned WPG Leases. The Cure Amount may increase prior to any actual date of assumption and assignment of the WPG Leases, including the Potentially Assigned Leases, if the Debtors do not pay all amounts that accrue after the date of this Objection, and any taxes, common area maintenance and other amounts that may come due, pursuant to the terms of the WPG Leases, including the Potentially Assigned WPG Leases, and regardless of when those amounts accrued.

14. Accordingly, WPG expressly reserves its right to amend or supplement the Cure Amount from time to time and at any time, and requests that the Debtors remain liable for, among other things: (a) post-petition rent and other charges under the WPG Leases, including the Potentially Assigned WPG Leases; (b) certain amounts due and owing under the WPG Leases, including the

⁵ The Cure Amount includes \$1,500.00 in attorneys' fees per Leased Premises, as noted below.

Potentially Assigned WPG Leases, but which may be unbilled as of the date hereof, including but not limited to year-end adjustments for common area maintenance, taxes and similar charges; (c) any regular or periodic adjustment of charges under the WPG Leases, including the Potentially Assigned WPG Leases, which were not due or had not been determined as of the date of this Objection; (d) any percentage rent that may be due under the WPG Leases, including the Potentially Assigned WPG Leases; (e) any non-monetary defaults; and/or (f) insurance and indemnification obligations under the WPG Leases, including the Potentially Assigned WPG Leases.

15. WPG is also entitled to attorneys' fees as part of the Cure Amount for the WPG Leases, including the Potentially Assigned WPG Leases. *In re Westview 74th Street Drug Corp.*, 59 B.R. 747, 757 (Bankr. S.D.N.Y. 1986) (payment of attorneys' fees required as condition to lease assumption). Any attorneys' fees accrued over and above that amount should be paid to WPG in addition to the Cure Amount set forth herein.

16. In addition, WPG requests that any order approving the assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases, provides, among other things, that any assignee of the WPG Leases, including the Potentially Assigned WPG Leases, will be responsible for all accrued, but unbilled charges under the WPG Leases, including the Potentially Assigned WPG Leases, including unpaid year-end adjustments and reconciliations, whether accruing prior to or after the effective date of assumption and/or assignment of the WPG Leases, including the Potentially Assigned WPG Leases, when such charges become due in accordance with the terms of the WPG Leases, including the Potentially Assigned WPG Leases. This result is mandated by the requirement that the Debtors cure all arrears and that the Debtors provide adequate assurance of future performance under the terms of the WPG Leases, including the Potentially Assigned WPG Leases. *See* 11 U.S.C. § 365(b)(1).

17. Any assumption and/or assignment of the WPG Leases, including the Potentially Assigned WPG Leases, should be conditioned upon, among other things, full compliance with section 365 of the Bankruptcy Code, including, but not limited to, the payment to WPG of all amounts due and owing under the WPG Leases, including the Potentially Assigned WPG Leases, through the effective date of assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases, *i.e.*, the Cure Amount, and the provision by the Debtors and/or the proposed assignee of sufficient adequate assurance of future performance information.

18. To the extent that rent, attorneys' fees, interest, and/or other charges continue to accrue, and/or WPG suffers other pecuniary losses with respect to the WPG Leases, including the Potentially Assigned WPG Leases, WPG further reserves the right to amend the Cure Amount to: (i) reflect such additional amounts; and (ii) to account for year-end adjustments, including, without limitation, adjustments for calendar years 2017, 2018 and 2019 (collectively, the "Adjustment Amounts"), which have not yet been billed or have not yet become due under the terms of the WPG Leases, including the Potentially Assigned WPG Leases. The Debtors or any assignee of the WPG Leases, including the Potentially Assigned WPG Leases, must be responsible for satisfying the Adjustment Amounts when due in accordance with the terms of the WPG Leases, including the Potentially Assigned WPG Leases, regardless of when such Adjustment Amounts were incurred. To the extent that the Debtors are to remain responsible for any Adjustment Amounts, WPG requests that at the closing of the Proposed Sale, such funds be placed into a separate and segregated escrow account outside of the Debtors' chapter 11 bankruptcy estates so that there is no question that sufficient, earmarked, unencumbered funds will be available to pay WPG when said Adjustment Amounts become due and owing to WPG in accordance with the terms of the WPG Leases.

19. WPG also requests that any assignee of the WPG Leases, including the Potentially

Assigned WPG Leases, be required to comply with all contractual obligations in the WPG Leases to indemnify and hold WPG harmless with regard to events which may have occurred before assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases (in addition to events which occur on or after the assignment) but which were not known to either WPG or the Debtors as of the date of the assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases, including, but not limited to, claims for personal injury that occurred at the Leased Premises, damage and destruction to the Leased Premises or property by the Debtors or its agents, and environmental damage or environmental clean-up.

20. Furthermore, because the Leased Premises are located in shopping centers, any adequate assurance of future performance information provided to WPG in connection with the Proposed Sale must demonstrate that the heightened standards for adequate assurance of future performance in a shopping center will be satisfied by the proposed assignee, including, but not limited to, compliance with the use clause, radius and tenant mix provisions in the WPG Leases, including the Potentially Assigned WPG Leases, all in accordance with section 365 of the Bankruptcy Code. Accordingly, WPG reserves all of its rights to assert objections on adequate assurance grounds.

RESERVATION OF RIGHTS

21. Nothing in this Objection is intended to be, or should be construed as, a waiver by WPG of any of its rights under the WPG Leases, including the Potentially Assigned WPG Leases, the Bankruptcy Code, or applicable law. WPG expressly reserves all such rights including, without limitation, the right to: (a) supplement and/or amend this Objection and to assert any additional objections with respect to the Cure Amount, adequate assurance of future performance, and/or any proposed assumption and assignment of the WPG Leases, including the Potentially Assigned Leases; (b) amend the Cure Amount; (c) assert any nonmonetary defaults under the WPG Leases; (d) assert

any rights for indemnification or contribution against the Debtors arising under the WPG Leases; and
(e) assert any further objections with respect to the relief requested that may subsequently be sought by the Debtors and/or any other party, as such requested relief relates to the WPG Leases, including the Potentially Assigned WPG Leases, and/or the interests of WPG.

22. WPG is filing an objection to the Proposed Sale to the Proposed Buyer and the potential assumption and assignment of the WPG Leases, including the Potentially Assigned WPG Leases, and WPG reserves its rights accordingly.

JOINDER

23. WPG joins in any objections filed by other landlords to the extent they are not inconsistent with this Objection.

CONCLUSION

WHEREFORE, WPG respectfully requests that this Court enter an order: (a) sustaining this Objection; and (b) granting WPG such other and further relief as this Court deems just and appropriate under the circumstances.

[Signature page follows.]

Dated: January 25, 2019

FROST BROWN TODD LLC

/s/ Ronald E. Gold

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, a copy of the foregoing was served electronically or via First Class Mail, postage prepaid upon all those identified on the Master Service List as of January 25, 2019 in accordance with this Court's: (i) *Amended Order Implementing Certain Notice and Case Management Procedures* entered November 1, 2018 (Docket No. 405); and (ii) *Order Approving Global Bidding Procedures and Granting Related Relief* entered November 19, 2018 (Docket No. 816) and the service requirements established thereby.

/s/ Ronald E. Gold

Ronald E. Gold

EXHIBIT A

“WPG Leases”

<i>Potentially Assigned WPG Leases</i>				
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>	<i>Proposed Cure Amount</i>	<i>Cure Amount</i>
Boynton Beach Mall (including Auto Center)	1755, 6820	Boynton Beach, Florida	\$39,680.46	\$67,055.00
Charlottesville	2435	Charlottesville, Virginia	\$47,167.95	\$36,625.51
Chautauqua Mall	2584	Lakewood, New York	\$12,108.25	\$21,438.17
Indian Mound Mall	1081	Heath, Ohio	\$8.00	\$94,424.67
Longview Mall	2557	Longview Mall, Texas	\$26,041.67	\$73,455.93
Mall at Johnson City	2265	Johnson City, Tennessee	\$15,085.00	\$6,520.71
Morgantown Mall	2304	Morgantown, West Virginia	\$8,333.33	\$1,510.47
Pearlridge	1578	Aiea, Hawaii	\$71,534.00	\$676,507.67
Polaris Fashion Place (including Auto Center)	1210	Columbus, Ohio	\$26,041.67	\$352,888.32
Port Charlotte Town Center	2145	Port Charlotte, Florida	\$39,739.94	\$151,002.23
Southern Hills Mall	2422	Sioux City, Iowa	\$71,871.21	\$131,637.69
Town Center at Aurora	1141	Aurora, Colorado	\$26,042.00	\$226,050.00
Weberstown Mall	1288	Stockton, California	\$250.00	\$2,300.00
Westshore Plaza (including Auto Center)	1745	Tampa, Florida	\$42,269.63	\$216,736.60
Whitehall Mall	1154	Whitehall, Pennsylvania	\$10,820.00	\$198,051.12
<i>Total</i>			<i>\$436,993.11</i>	<i>\$2,124,566.40</i>
<i>Seritage SRC Finance LLC-Associated Leases</i>				
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>	<i>Proposed Cure Amount</i>	<i>Cure Amount</i>
Bowie Town Center	2034	Bowie, Maryland	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Dayton Mall	1560	Dayton, Ohio	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Edison Mall	1495	Ft. Myers, Florida	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Great Lakes Mall	<i>Not Scheduled⁶</i>	Mentor, Ohio	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Irving Mall	2147	Irving, Texas	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Jefferson Valley Mall	1944	Yorktown Heights, New York	<i>Rights Reserved</i>	<i>Rights Reserved</i>

⁶ “Not Scheduled” means not presently scheduled on the Potential Assumption and Assignment Notices.

<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>	<i>Proposed Cure Amount</i>	<i>Cure Amount</i>
Lindale Mall	<i>Not Scheduled</i>	Cedar Rapids, Iowa	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Maplewood Mall	<i>Not Scheduled</i>	St. Paul, Minnesota	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Paddock Mall	1006	Ocala, Florida	<i>Rights Reserved</i>	<i>Rights Reserved</i>
University Town Plaza	<i>Not Scheduled</i>	Pensacola, Florida	<i>Rights Reserved</i>	<i>Rights Reserved</i>
Westminster Mall	<i>Not Scheduled</i>	Westminster, California	<i>Rights Reserved</i>	<i>Rights Reserved</i>
<i>Remaining WPG Leases</i>				
<i>Shopping Center</i>	<i>Store No.</i>	<i>City, State</i>	<i>Proposed Cure Amount</i>	<i>Cure Amount</i>
Anderson Mall	<i>Not Scheduled</i>	Anderson, South Carolina	<i>Not Scheduled</i>	\$1,500.00
Cottonwood Mall	<i>Not Scheduled</i>	Albuquerque, New Mexico	<i>Not Scheduled</i>	\$6,910.42
Northwoods Mall	<i>Not Scheduled</i>	Peoria, Illinois	<i>Not Scheduled</i>	\$4,597.00
Orange Park Mall	<i>Not Scheduled</i>	Orange Park, Florida	<i>Not Scheduled</i>	\$1,500.00
Rolling Oaks	<i>Not Scheduled</i>	San Antonio, Texas	<i>Not Scheduled</i>	\$6,083.35
Seminole Towne Center	<i>Not Scheduled</i>	Sanford, Florida	<i>Not Scheduled</i>	\$1,500.00
Sunland Park Mall	<i>Not Scheduled</i>	El Paso, Texas	<i>Not Scheduled</i>	\$1,500.00
West Ridge Mall	<i>Not Scheduled</i>	Topeka, Kansas	<i>Not Scheduled</i>	\$1,500.00
<i>Total</i>				<i>\$25,090.77</i>
<i>Aggregate Total (All WPG Leases)</i>			<i>\$436,993.11</i>	<i>\$2,149,657.17</i>

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